

STATE OF MICHIGAN
COURT OF APPEALS

BADI ZOHOURY and WILMA ZOHOURY,

Plaintiffs-Appellants,

v

JAMES STERLING SMITH and FADI SAAD,

Defendants,

and

MICHAEL PATRICK MORROW,

Defendant-Appellee.

UNPUBLISHED

March 1, 2005

No. 251476

Oakland Circuit Court

LC No. 2002-040835-NI

Before: Fort Hood, P.J., and Griffin and Donofrio, JJ.

PER CURIAM.

Plaintiffs appeal as of right the order of dismissal entered after the trial court granted defendant Morrow's motion for summary disposition. We reverse. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff Badi Zahoury was injured in an automobile accident. In this appeal, plaintiffs argue that there was a question of fact concerning who was driving the vehicle that caused the accident. At the accident scene, defendant Morrow was sitting in the driver's seat and told police that he was the driver of the vehicle. Defendant Smith was in the passenger's seat.

The next week, defendant Morrow reported to the Clawson Police Department that he had lied in his statement, and that defendant Smith was the actual driver. Morrow explained that he took responsibility because Smith was driving on a suspended license and feared losing his vehicle. The next week Smith gave a statement to Clawson police indicating that he was the driver. He subsequently pleaded guilty to driving with a suspended license.

Defendant Morrow moved for summary disposition under MCR 2.116(C)(10), asserting that there was no genuine issue of material fact that he was not the driver of the vehicle. The trial court granted the motion.

A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating the motion, the trial court considers affidavits, pleadings, depositions, admissions and other evidence submitted by the parties in a light most favorable to the party opposing the motion. *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999). Where the proffered evidence fails to establish a genuine issue of material fact, the moving party is entitled to judgment as a matter of law. *Id.*

On appeal, a trial court's decision on a motion for summary disposition is reviewed de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). This Court must review the record in the same manner as the trial court to determine whether the movant was entitled to judgment as a matter of law. *Michigan Educational Employees Mutual Ins Co v Turow*, 242 Mich App 112, 114-115; 617 NW2d 725 (2000).

This Court is liberal in finding a genuine issue of material fact. *Marlo Beauty Supply, Inc v Farmers Ins Group*, 227 Mich App 309, 320; 575 NW2d 324 (1998). A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds could differ. *West v GMC*, 469 Mich 177, 183; 665 NW2d 468 (2003). The court may not make findings of fact or weigh credibility in deciding a summary disposition motion. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). Thus, when the truth of a material factual assertion depends on credibility, a genuine factual issue exists, and summary disposition may not be granted. *Metropolitan Life Ins Co v Reist*, 167 Mich App 112, 121; 421 NW2d 592 (1988).

The only witnesses with knowledge of who was driving the vehicle are defendants Smith and Morrow. The issue is not their credibility weighed against other evidence, but a question of which of their stories is credible. That defendant Morrow exposed himself to liability by telling police that his initial report was false, and defendant Smith subjected himself to the charge of driving with a suspended license does not rule out the possibility that their second story was false. Defendant Smith declared bankruptcy after this action was filed, and was thus insulated from financial liability. It is possible that he changed his story because he knew he would have no liability. A party or witness may not create a factual dispute by submitting an affidavit that contradicts his own sworn testimony or prior conduct. *Dykes v William Beaumont Hosp*, 246 Mich App 471, 480; 633 NW2d 440 (2001); *Palazzola v Karmazin Products Corp*, 223 Mich App 141, 155; 565 NW2d 868 (1997); *Aetna Casualty & Surety Co v Ralph Wilson Plastics Co*, 202 Mich App 540, 548; 509 NW2d 520 (1993). It follows that a party cannot eliminate a factual question by contradicting his former statement.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ Karen M. Fort Hood
/s/ Richard Allen Griffin
/s/ Pat M. Donofrio